No. 04-1365

Supreme Court, U.S.
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In The
Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURTITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Petitioners,

v.

HENTSCH HENCHOZ & CIE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Utah

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Utah Supreme Court in its discretion may dismiss an appeal because of appellants' wilful disobedience of district and appellate court orders and the appellants' failure to remedy the violations as a condition to a decision on the merits of the appeal?

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns any stock in respondent. Respondent Hentsch Henchoz & Cie, a private banking partnership organized under the laws of Switzerland, merged in 2002 with Lombard Odier Darier Hentsch & Cie, a private banking partnership organized under the laws of Switzerland. No parent corporation owns any stock in respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Hentsch Henchoz & Cie ("HH&C") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari ("Petition") filed by petitioners Capital Suisse, Inc., Capital Suisse, S.A., Zooley Services, Ltd., Zooley of Utah, Inc., Fernland Limited, and Philippe D. David Gubbay (collectively "Capital Suisse").

COUNTERSTATEMENT OF THE CASE

The Petition represents the culmination of Capital Suisse's concerted efforts to perfect and preserve its theft of $25 million from HH&C. Between December 2000 and March 2001, HH&C wired nearly $25 million to the Gibralter account of Capital Suisse, S.A., a purported "Mutual Fund for the Professional Investor," headquartered in Marbella, Spain. Capital Suisse, however, ultimately proved to be a sham; HH&C's money was never invested, but transferred from the Gibralter account to accounts in Salt Lake City, Utah, and wired throughout the world to Capital Suisse's principals, family and friends.

To trace and recover its $25 million, HH&C invoked the assistance of the Spanish courts, and then the Utah courts. Capital Suisse steadfastly refused to provide information to enable HH&C to trace or recover its money, eventually (i) removing documents maintained in its Utah office to Spain, (ii) defying orders of the Utah district court to answer HH&C's interrogatories and document requests, and to return the documents from Spain to Utah, and (iii)

refusing to recognize the jurisdiction of the Utah courts or to participate in the litigation further.

After the district court granted summary judgment on HH&C's claims against Capital Suisse (in the amount of $24,730,000.00 plus interest), Capital Suisse attempted to resurrect the jurisdiction of the Utah courts by appealing an earlier decision of the district court denying Capital Suisse's Motion to Dismiss HH&C's Verified Complaint for improper venue. The Utah Supreme Court, however, stayed the appeal until Capital Suisse complied with two conditions: (i) post a bond in the amount of the judgment, and (ii) comply with the outstanding orders of the district court within thirty days.

Capital Suisse did neither. Capital Suisse did not post a bond, did not return all documents from Spain, did not adequately answer HH&C's interrogatories (many of which were intended to trace HH&C's money), and did not produce documents maintained in Marbella, Spain. Nonetheless, Capital Suisse sought a "Certification," first in the district court and then in the Utah Supreme Court, that it had made a "good faith" attempt to comply with the conditions. The Utah Supreme Court invited further briefing, and then dismissed Capital Suisse's appeal per curiam, because Capital Suisse "failed to comply with this court's decision." (Petitioner's Appendix ("Pet. App.") 18a).

Now, Capital Suisse petitions this Court for a Writ of Certiorari. Contrary to the Petition, this case does not present an opportunity "to resolve two separate conflicts regarding a court's ability, consistent with due process and equal protection principles, to deprive a party of its right to appeal based upon the party's inability to comply with court-imposed conditions on that right." (Petition ("Pet.")

at 3). For the following reasons, this Court should deny the Petition:

First, this "opportunity" was never presented to the Utah Supreme Court, in violation of this Court's Rule 14.1(g)(i). None of the arguments in the Petition were ever presented below. Capital Suisse made a passing, generic reference to "due process" in its Certification before the Utah Supreme Court, but made no assertion that imposition of a bond that it claimed it had no ability to pay raised a *federal* Due Process Clause claim, and cited no authority at all to support such a claim. Further, Capital Suisse never even invoked the words "equal protection," much less raised a *federal* Equal Protection Clause claim before the Utah Supreme Court.

Second, the Petition ignores an independent ground for dismissal of the appeal. The Petition focuses almost exclusively on Capital Suisse's claimed "inability" to post a bond for the amount of the judgment, but ignores the independent ground on which dismissal of the appeal rested – Capital Suisse's refusal or failure to comply with the outstanding orders of the district court.

Third, there is no conflict between the Utah Supreme Court decision and the Second Circuit decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). In *Pennzoil*, the Second Circuit enjoined application of a Texas statute that required an appellant *in all cases* to post a supersedeas bond as a condition of an appeal. *Id.* at 1156. The Second Circuit held this mandatory or "inflexible" requirement, without regard to the appellant's ability to pay, violated the Due Process Clause of the United States Constitution. *Id.* at 1154.

The Utah Supreme Court, on the other hand, fashioned "a remedy that is fair and just under the circumstances, taking into account the facts of the particular case," and dismissed the appeal only after it gave Capital Suisse an opportunity to "show cause" why the appeal should not be dismissed. This Court and numerous state courts have upheld the authority and the right of an appellate court to dismiss the appeal of an appellant who stands in contempt of the district court. That principle was never addressed in the Second Circuit *Pennzoil* decision. Finally, the conflict, if any, is not significant because both *Pennzoil* and this case are unique and factbound.

1. The Initial State Court Proceedings.

The first decision of the Utah Supreme Court thoroughly and accurately presents the factual basis necessary for this Court's determination of the Petition. (Pet. App. 1a-6a). However, certain facts not addressed in the Utah Supreme Court decision were erroneously presented in the Petition. First, the Petition incorrectly alleges that in lieu of redeeming HH&C's shares in the Capital Suisse Fund, that "Capital Suisse offered to provide HH&C valuable stock in a related company." (Pet. 5). In fact, these shares were worthless shares in a company called PetsMarketing, Inc., offered to HH&C as part of Capital Suisse's fraud. (Pet. App. 47a; Respondent's Appendix ("Resp. App.") 5b-7b). The district court specifically found that:

> [The] Capital Suisse Defendants misrepresented to HH&C, and to this Court, the value of the PetsMarketing shares purportedly transferred to HH&C at over $30 million. In fact, those shares had virtually no market or market value. Moreover, the Capital Suisse defendants themselves manipulated the trading in PetsMarketing, Inc.

> to boost artificially the publicly-quoted price of PetsMarketing, Inc. shares.

(Pet. App. 47a).

The Petition also incorrectly asserts that "because Capital Suisse could no longer afford office space in Utah, it moved its records to Spain – with full disclosure to the court and plaintiffs." (Pet. 7). This statement is flatly untrue and is squarely contrary to the record. It is clear from the record that the materials were removed from Utah to Spain to evade production. (Pet. App. 47a-48a; Resp. App. 3b-4b). Capital Suisse's agent in Utah, on advice of his counsel, refused to participate in shipping the documents and other materials to Spain to avoid possibly obstructing justice. (Resp. App. 3b-4b). Moreover, neither the district court nor HH&C was aware that the documents had been shipped to Spain. (Pet. App. 23a-25a; 47a-48a). When the district court ordered Capital Suisse to return the materials to Utah and make them available for discovery, Capital Suisse refused to comply with the district court's order and abandoned its defense of the litigation. (Pet. App. 48a). As the district court ruled in granting HH&C summary judgment, "[t]his is not the conduct of legitimate business persons." *Id.*

2. The Utah Supreme Court's First Decision.

After the district court's entry of summary judgment, Capital Suisse appealed to the Utah Supreme Court on the sole ground that the district court erred in refusing to enforce a forum selection clause purportedly requiring the litigation to proceed in the British Virgin Islands. (Pet. App. 6a). The Utah Supreme Court did not reach this issue on the merits. Instead, it considered the threshold issue

raised and fully briefed by HH&C, whether the Utah Supreme Court "may dismiss a civil appeal when the appellant disobeys the orders of the district court in the same action." *Id.*

The Utah Supreme Court first noted that Capital Suisse's contemptuous conduct was clearly sufficient to dismiss the appeal outright:

> In the present case, Capital Suisse's defiance of district court orders is clearly sufficient to warrant dismissal of the appeal. Though not formally adjudged in contempt, Capital Suisse's wilful disobedience would certainly have been adequate to support an order of contempt had Capital Suisse not absented itself from the litigation. Capital Suisse repeatedly refused to comply with discovery requests from HH&C and went to extreme lengths to prevent access to the Zions and Wells Fargo bank accounts. Upon being ordered by the district court to comply with discovery, Capital Suisse shipped all of its documents, records, and computer hard drives from Utah to Spain. On the heels of this insubordination, upon being ordered to return the awol documents and other evidence, Capital Suisse abruptly withdrew from the litigation, claiming that the district court had no jurisdiction over it.

(Pet. App. 9a-10a).

Based upon well-reasoned authorities from numerous jurisdictions and its own plenary powers, the Utah Supreme Court unanimously concluded:

> [T]his court, in its discretion, may dismiss the appeals of appellants who have wilfully disobeyed an order of a lower court in the same action. We

> agree with the approach adopted by the court of appeals that allows the reviewing appellate court to exercise its discretionary authority by fashioning a remedy that is fair and just under the circumstances, taking into account the facts of the particular case. Such authority is indispensable since it would "violate[] the principles of justice to allow a party who flaunts the orders of the courts to seek judicial assistance" on appeal. *D'Aston*, 790 P.2d at 593 (citing *Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962); *Rude v. Rude*, 153 Cal.App.2d 243, 314 P.2d 226, 230 (1957); *Greenwood v. Greenwood*, 191 Conn. 309, 464 A.2d 771, 773 (1983); *Strange v. Strange*, 464 S.W.2d 216, 219 (Tex. Civ. App. 1970) (per curiam)).

(Pet. App. 8a-9a).

The Utah Supreme Court, in its discretion, fashioned a "fair and just [remedy] under the facts and circumstances of the particular case." (Pet. App. 12a-13a). The Court ruled:

> Accordingly, we hereby stay this appeal to allow Capital Suisse time to comply with the following conditions, which must be fulfilled before we will entertain the appeal on the merits. First, Capital Suisse must, within thirty days from the date of this decision, bring itself into compliance with the orders of the district court in this matter, including those orders requiring Capital Suisse to comply with discovery and to return all of the requested documents and evidence to Utah. Second, inasmuch as we are concerned that any continued delay will lead to the further dissipation of Capital Suisse's assets, we also require Capital Suisse to post bond with the district

> court in the amount of any unsatisfied portion of the judgment that has been entered against it.

(Pet. App. 13a).

The Utah Supreme Court remanded the matter to the district court to make the following relevant determinations: "(1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; . . . and (3) whether Capital Suisse has posted an adequate bond in that amount [of the outstanding judgment]." *Id.*

Finally, the Utah Supreme Court ordered that:

> Capital Suisse must, within ninety days, provide this court with notice that it has complied with these conditions, including the relevant orders of the district court regarding whether Capital Suisse has fulfilled the court's discovery orders within the allotted thirty-day time period and posted bond in the appropriate amount. If, at the end of ninety days, Capital Suisse has failed to comply with each of these requirements, or continues to resort to evasive or dilatory tactics, the appeal will be dismissed without further notice or argument.

Id.

3. The District Court's Decision on Remand.

After the expiration of the thirty day period prescribed by the Utah Supreme Court, the parties fully briefed the issue of whether Capital Suisse had complied with the specific conditions of the Utah Supreme Court. Following a hearing on the compliance issue, the district court entered its order determining that Capital Suisse had not complied

with the express conditions set forth in the Utah Supreme Court's decision. (Pet. App. 15a-17a).

4. The Utah Supreme Court's Final Decision of Dismissal.

Capital Suisse then filed a Certification of Good Faith Attempt to Comply with Court Order ("Certification") in the Utah Supreme Court. (Resp. App. 10b-27b). By order dated November 10, 2004, the Utah Supreme Court requested further briefing as to why it "should not dismiss" the appeal for Capital Suisse's "failure to comply" with the Court's prior decision. (Resp. App. 28b-29b). Capital Suisse told the Utah Supreme Court to regard its Certification as its "brief in response to the Court's Order to Show Cause." (Resp. App. 30b-31b). The Certification made only a fleeting reference to "due process," without specifying the United States or Utah Constitution, and made no mention at all of "equal protection."

HH&C filed a Brief in Opposition to Capital Suisse's Certification, with exhibits and affidavits, presenting evidence that Capital Suisse had not met the Utah Supreme Court's express conditions, and asserting that Capital Suisse's protestations of "good faith" were nothing more than one final attempt to preserve the fruits of its fraud and its wilful disobedience of the district court orders. (Resp. App. 32b-51b).

As to the condition that Capital Suisse post a bond, HH&C presented evidence that Capital Suisse had failed to show that it did not have the ability to post a bond in the full amount of the judgment. HH&C demonstrated that none of HH&C's $25 million was subject to the orders of the Spanish Court freezing Capital Suisse's accounts in

Gibralter and Spain, because Capital Suisse initially had wired HH&C's money out of those accounts in violation of the Spanish Court orders. (Resp. App. 37b-41b). HH&C argued that, because Capital Suisse had also wired HH&C's $25 million out of the Salt Lake City accounts and beyond the jurisdiction of the Utah (or American) courts to enforce a judgment, a bond in the full amount of the judgment was the only meaningful remedy available to HH&C. *Id.*

As to the condition that Capital Suisse comply with the outstanding orders of the district court, HH&C presented evidence that Capital Suisse had not made a good faith effort to return all documents from Spain, and had not made a good faith effort to answer HH&C's interrogatories or to produce documents. (Resp. App. 42b-50b). HH&C presented evidence that Capital Suisse's responses were patently deficient because Capital Suisse asserted that the information subject to the interrogatories could be ascertained from the records returned to Utah. *Id.* Those records were incomplete, were more than three years old, and did not provide the most fundamental information repeatedly requested by HH&C – such as the current location of HH&C's $25 million. HH&C argued that Capital Suisse's discovery responses were a bad-faith continuation of its steadfast obstruction of HH&C's attempts to trace or to recover its money, and its wilful disobedience of the district court orders. *Id.*

By Order dated January 11, 2005, the Utah Supreme Court dismissed Capital Suisse's appeal *per curiam*, because Capital Suisse "failed to comply with this court's decision in the above-captioned matter."

REASONS FOR DENYING THE PETITION

I. THE CLAIMED FEDERAL CONSTITUTIONAL ISSUES WERE NOT PROPERLY RAISED BELOW AND, FOR THAT REASON, WERE NOT DISCUSSED, ANALYZED NOR DECIDED BY THE UTAH SUPREME COURT.

Capital Suisse bases its Petition on the assertion that the Utah Supreme Court's discretion in dealing with Capital Suisse's repeated recalcitrance violates the Due Process and Equal Protection Clauses of the United States Constitution. These federal constitutional claims were not adequately raised below or sufficiently addressed by the Utah Supreme Court to make this case worthy of certiorari review.

A. Capital Suisse Ignores the Requirements of Rule 14.1(g)(i).

Supreme Court Rule 14.1(g)(i) requires a petitioner to specify the stage of state-court proceedings in which the federal questions sought to be reviewed were raised and the way the questions were passed on by the state courts. Rule 14.1(g)(i) requires in pertinent part:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was

> timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14.1(g)(i).

Contrary to the mandates of Rule 14.1(g)(i) which the Petition ignores, the federal constitutional issues sought by Capital Suisse to be reviewed by this Court were not timely and properly raised in the Utah courts. Therefore, this Court should decline to exercise jurisdiction to review the judgment on a writ of certiorari. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."). *See also Hill v. California*, 401 U.S. 797, 805 (1971); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.") (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)); 28 U.S.C. § 1257(a) (1993) (in order for the Court to have jurisdiction to issue a writ of certiorari a federal Constitutional right must have been "specially set up or claimed").

B. Capital Suisse Only Fleetingly Raised a Generic Due Process Issue Below and Only Upon Remand to the District Court.

In its initial briefing to the Utah Supreme Court, Capital Suisse did not raise any due process issue. It failed to do so despite the fact that HH&C argued that the appeal should be dismissed because of Capital Suisse's

wilful disobedience of the district court's orders and, also, that a bond was necessary to prevent further dissipation of Capital Suisse's assets. In its Reply Brief to the Utah Supreme Court, Capital Suisse argued that it has a "substantive right to appeal," but did not argue that dismissal of the appeal for its contemptuous conduct, or requiring the imposition of a bond, would violate due process. (Pet. App. 12a).

After remand, Capital Suisse argued in its Certification to the Utah Supreme Court that it had made a good faith attempt to comply with the Utah Supreme Court's conditions. Capital Suisse made only a single, fleeting reference, without citation to any authority, to generic due process:

> Absent a finding by this Court that the bond requirement has been satisfied in light of the Spanish Court's orders, or, at a minimum removing the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and has been, in effect, condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. Capital Suisse therefore requests that the Court hold the bond is sufficiently satisfied.

(Resp. App. 19b).

Capital Suisse cited no authority to support this reference and made no other due process arguments. Thus, Capital Suisse did not raise its federal claims with "fair precision and in due time." *Adams*, 520 U.S. at 88. This Court has consistently determined that an isolated citation to a federal issue in the midst of an unrelated argument is insufficient. *Id.*; *Bd. of Dirs. of Rotary Int'l v.*

Rotary Club of Duarte, 481 U.S. 537, 550 n.9 (1987). *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ("generic reference" to Fourteenth Amendment insufficient to preserve a constitutional claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (vague appeal to constitutional principles does not preserve constitutional claim).

Capital Suisse's passing reference to "due process" did not even specify a federal or state constitutional issue. As this Court explained in *Adams*:

> [T]he passing invocations of "due process" we found [in petitioners' state court reply brief] fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution and thus did not meet our minimal requirement that it must be clear that a *federal* claim was presented.

520 U.S. at 89 n.3 (emphasis in original) (citations omitted). *See also Bankers Life*, 486 U.S. at 77-78 ("[A]t the minimum there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)) (emphasis in original)).

The Petition now relies primarily upon the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), as the authority for its due process argument. However, Capital Suisse never cited the *Pennzoil* case to the Utah Supreme Court as authority for a violation of due

process – even after the district court had determined that Capital Suisse had not complied with the Utah Supreme Court's conditions. Capital Suisse's only citation below to the Second Circuit's *Pennzoil* decision was for the narrow proposition that "a judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be secure . . . from loss resulting from the stay of execution." (Resp. App. 15b-16b). Capital Suisse did not cite *Pennzoil* for the proposition that a bond imposed on a contemptuous appellant violates the Due Process Clause if an appellant cannot pay it. *See Adams*, 520 U.S. at 88 ("The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" (quoting *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 550 n.9)).

Additionally, Capital Suisse never raised any due process challenge to the Utah Supreme Court's condition that Capital Suisse comply with the outstanding discovery orders of the district court. As a result, the Utah Supreme Court never addressed the *Pennzoil* decision or fully analyzed the due process issue.

This Court is faced with the same situation as in *Adams* and *Bankers Life*. The Petition makes no reference to where and how the due process issue was timely and properly preserved, as required by Rule 14.1(g)(i). Even after being invited by the Utah Supreme Court to submit additional briefing after remand, Capital Suisse failed to do so. (Resp. App. 28b-29b; 30b-31b). Despite this opportunity to raise a federal Due Process Clause claim, Capital Suisse did not do so, and the issue was not determined by the Utah Supreme Court. Therefore, this is not a proper case, factually or legally, for certiorari review on the due process issue asserted in the Petition.

C. Capital Suisse Did Not Raise the Equal Protection Issue Below.

This Court should not review Capital Suisse's assertion that the Utah Supreme Court decision conflicts with federal Equal Protection Clause precedents established by several state courts and this Court. The Petition makes no reference to raising equal protection, state or federal, in either the district court or in the Utah Supreme Court because Capital Suisse never did so. *See* Rule 14.1(g)(i). For this reason, in this case the Utah Supreme Court has not construed, nor interpreted, the federal Equal Protection Clause in a manner that could be inconsistent with the decision or precedent of any other court. Moreover, the cases cited in the Petition purportedly conflicting with the Utah Supreme Court's opinions (Pet. 20-21) were not raised nor cited below and are clearly distinguishable as they do not involve the situation where an appellate court, in its discretion, requires a bond from a contemptuous appellant in order to reach the merits of the appeal. As a result, for the same reasons discussed in sections I.A. and I.B., *supra*, the Petition should be denied.

II. THIS CASE IS INAPPROPRIATE FOR CERTIORARI REVIEW SINCE CAPITAL SUISSE'S VIOLATIONS OF THE DISCOVERY ORDERS ARE FACTUALLY AND LEGALLY INDEPENDENT BASES FOR DISMISSAL OF THE APPEAL BY THE UTAH SUPREME COURT.

Based on Capital Suisse's wilful disobedience of the district court's discovery orders and a concern that Capital Suisse would continue to resort to evasive and dilatory tactics, the Utah Supreme Court imposed two conditions on Capital Suisse: fully comply with the outstanding

orders of the district court within thirty days, including returning all documents removed from Utah to Spain and answering HH&C's outstanding interrogatories and document requests, and post a bond in the amount of the judgment. (Pet. App. 13a). Despite the Utah Supreme Court's imposition of *two* conditions, the Petition focuses almost exclusively on the condition requiring the posting of a bond.

The parties submitted extensive briefing to the district court concerning Capital Suisse's purported "good faith" compliance with the Utah Supreme Court's mandate. After review of the memoranda and after a hearing, the district court determined that Capital Suisse had not complied with the requirements of the Utah Supreme Court, specifically holding that Capital Suisse "failed to respond to Plaintiff's discovery requests as ordered." (Pet. App. 16a). Capital Suisse merely repeated the arguments made to the district court in its Certification to the Utah Supreme Court after the district court issued its order and determination. (Resp. App. 10b-27b).

At no time did Capital Suisse assert that its wilful disobedience to the district court's orders, or its failure to cure its contemptuous conduct, raised any federal constitutional issue. The Petition remains silent about this alternative basis for dismissing the appeal: Capital Suisse's failure to respond to HH&C's outstanding discovery. This independent basis for the Utah Supreme Court's decision to dismiss the appeal makes this case unworthy of certiorari review.

III. THERE IS NO GENUINE CONFLICT BETWEEN THE DECISION OF THE UTAH SUPREME COURT AND THE CASES CITED IN THE PETITION.

The Petition argues that Utah Supreme Court's decisions conflict with the nearly twenty-year-old decision of the Second Circuit in *Pennzoil*, but the Petition does not point to cases in any other jurisdiction addressing the specific due process issue raised in *Pennzoil*. Further, there is no conflict between the Utah Supreme Court's dismissal of Capital Suisse's appeal and the *Pennzoil* case.

A. The Second Circuit *Pennzoil* Decision.

The Petition rests its assertion of an "important due process issue" (Pet. at 12) almost entirely on an alleged conflict between the Utah Supreme Court decisions and the Second Circuit opinion in *Pennzoil*. (Pet. 12-16). However, the Second Circuit's decision in *Pennzoil* is both factually and legally distinguishable from this case. *Pennzoil* did not address the power of a state appellate court to dismiss an appeal of a contemptuous appellant. Instead, the issue of the Second Circuit, on which Capital Suisse relies, was whether Rule 364 of the Texas Rules of Civil Procedure violated Texaco's due process right to appeal because its mandatory and inflexible application to all appeals deprived Texaco of due process. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

In the instant case there is no "inflexible" statutory requirement at issue. In fact, the Utah Supreme Court crafted a flexible remedy to address Capital Suisse's wilful disobedience to discovery orders. Relying on precedent

from this Court and a number of other jurisdictions, the Utah Supreme Court correctly held an appellant does not have an absolute right of appeal after engaging in repeated wilfully disobedient and contemptuous conduct. (Pet. App. 12a) ("the right of appeal is not absolute and may be forfeited"). Unlike the mandatory bond requirement statutorily imposed in *Pennzoil*, the Utah Supreme Court's approach is a "fair and just" approach "under the facts and circumstances" of this particular case. (Pet. App. 13a).

B. On Certiorari Review of the Second Circuit Opinion in *Pennzoil*, This Court Emphasized that an Appellate Court has Inherent Authority to Remedy Contempt.

In *Texaco, Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987), this Court reversed the Second Circuit, holding that the *Younger* abstention doctrine prohibited the Second Circuit from considering constitutional claims that had not been presented to the Texas courts, much like the claims in this case had not been presented to the Utah Supreme Court. *See id.*, 481 U.S. at 16-17. The majority Opinion, therefore, did not address the due process issue.

However, this Court's decision emphasized the importance of the individual states controlling their contempt procedures. This Court noted that neither the federal district court nor the Second Circuit "applied the appropriate standard in determining whether adequate relief was available in the Texas courts." 481 U.S. at 10. In so ruling, this Court confirmed a state's interest in vindicating its contempt power:

> This Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems. [citations omitted] In *Juidice v. Vail*, 430 U.S. 327 (1977), we held that a federal court should have abstained from adjudicating a challenge to a State's contempt process. The Court's reasoning in that case informs our decision today:
>
> > "A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as the State's interest in the enforcement of its criminal law, *Younger, supra*, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman, supra*. But we think it is of sufficiently great import to require application of the principles of those cases."

481 U.S. at 12-13 (quoting *Juidice*, 430 U.S. at 335). This Court emphasized that the contempt power "stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 13 (quoting *Juidice*, 430 U.S. at 336 n.12).

The Utah Supreme Court did nothing more than vindicate Utah's important interests in administering it own judicial system by fashioning a fair and just remedy to deal with a contemptuous and defiant appellant. This comports with this Court's opinion in *Pennzoil* recognizing

the right of States to control their own contempt procedures.

C. The Utah Supreme Court's Decision Relied Upon, and is Fully Consistent With, the Precedent of This Court and a Myriad of Other Courts.

Capital Suisse claims that the Utah Supreme Court added a "judicial gloss to the constitutional right to appeal by stating that 'it is not absolute and the right may be forfeited, or a valid appeal may be dismissed, due to the acts or omissions of the appellant.'" (Pet. 9, quoting (Pet. App. 12a)). This "judicial gloss" is well-founded in the precedents of this Court. In reaching its decision, the Utah Supreme Court cited this Court's ruling in the *National Union* case:

> [T]he United States Supreme Court has held that dismissing the appeal of an appellant who wilfully defies court orders does not violate due process, but rather, may be a "reasonable means of safeguarding the collectibility of [a] judgment." *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 41, 43-44 (1954) ("While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process.").

(Pet. App. 12a).

In *National Union*, this Court upheld the authority of a state court to dismiss an appeal because of an appellant's actions to frustrate the effectiveness of a judgment. This Court noted:

> While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal.

348 U.S. at 43.

The Petition unsuccessfully attempts to distinguish *National Union* in a footnote, stating that *National Union* does not "control the outcome of this case" because (i) the *National Union* petitioner "did not make a good faith effort to comply with the lower court's bond order," and (ii) because the state of Washington, unlike Utah, does not provide a constitutional right to appeal in civil cases. (Pet. 17 n.3). The differences are insignificant because the Utah Supreme Court, as well as the district court, decided that Capital Suisse's "good faith" efforts were insufficient to comply with the district court's prior discovery orders. After rejecting Capital Suisse's "good faith" arguments, the Utah Supreme Court dismissed the appeal. Further, the *National Union* decision was not based on a state granted constitutional right of appeal, and did not suggest that the outcome would have been any different if the Washington State Constitution provided for an absolute right of appeal in civil cases. The Petition ignores the clear holding in *National Union*: dismissal of an appellant's appeal does not violate due process when the appellant defies a lower court's orders. 348 U.S. at 45. *See also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-54 (1909) (holding trial court's striking of pleadings and entry of default judgment did not violate due process when the

party refused to comply with discovery orders); *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (upholding dismissal of complaint as a sanction for plaintiff's failure to comply with discovery orders and answer interrogatories) (per curiam). Consistent with this Court's prior rulings, the Utah Supreme Court correctly dismissed Capital Suisse's appeal as result of its contemptuous conduct.

D. The Purported Conflict is Totally Insignificant.

Nearly twenty years have passed since the Second Circuit opinion in *Pennzoil*. As the Petition readily illustrates, few courts have faced the issue involved in *Pennzoil*. In fact, the Second Circuit recognized that the scope and precedential value of its decision was limited:

> We hasten to note that our decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur: a private civil money judgment in an amount unprecedented in the annals of legal history, a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal, the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment, and the likelihood that immediate enforcement of the Texas lien and bond provisions would lead to irreversible destruction of the debtor before its appeal could be heard and decided on the merits, thus robbing its right of appeal of any meaning and effect. For these reasons our decision, like that of the Fifth Circuit in

> *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application.

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). Even stretched to the extreme, the Utah Supreme Court's decision presents no important conflict with the Second Circuit's decision in *Pennzoil* requiring review by this Court.

Nor would granting the Petition provide any appreciable assistance to the lower courts. The Petition suggests that the issues presented "are of national significance." (Pet. 23). However, Capital Suisse reaches this conclusion by merely stating that "the right to appeal a decision of a state trial court [] is found in state constitutions across the country." *Id.* Capital Suisse's conclusory statement does not make this case worthy of certiorari review. Like the Second Circuit's decision in *Pennzoil*, the circumstances of this case are unique. Despite Capital Suisse's argument that the Utah Supreme Court acted "arbitrarily," the Supreme Court found, based upon a review of specific conduct, that Capital Suisse wilfully disobeyed the lower court's orders. (Pet. App. 10a). Such a conclusion was well reasoned based upon the wilful conduct of Capital Suisse. Therefore, the risk that any "federal or state court" would arbitrarily "extinguish" appeal rights is non-existent. Since the purported conflict is insignificant, the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted this 3rd day of June, 2005.

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of: The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against: **Philip David Gubbay** Court of First Instance and Instruction No. 2 Marbella Court No. 1346/2000	**AFFIDAVIT OF DAVE E. SMITH** Consolidated Case No. 010905355 Judge Ronald E. Nehring
HENTSCH HENCHOZ & CIE, Plaintiff vs. PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE, INC., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10, Defendants.	

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Dave E. Smith, after being duly sworn under oath, states as follows:

1. I am a resident of the state of Utah. My home address is 12378 South Margaret Rose Drive, Riverton, Utah 84065. I am a Certified Public Accountant ("CPA").

2. I am represented by James R. Holbrook of Callister, Nebeker & McCullough, with regard to this affidavit.

3. I was employed with members of the Capital Suisse Group of Companies (the "Capital Suisse Group") from December 1, 1999, through April 1, 2002, when I resigned. During that time, I held the following positions: Chief Financial Officer ("CFO"), Executive Vice President and Director of Capital Suisse Management, Director, Secretary and Controller of Zooley of Utah, Inc., Controller of Capital Suisse, Inc. and Treasurer of Capital Suisse Securities. My proposed written employment agreement was with Capital Suisse, Inc. In my experience, it was common for Capital Suisse Group employees and officers frequently to change titles and positions within the group.

4. My job duties with the Capital Suisse Group included, among other things, maintaining the financial records and books of Capital Suisse, Inc. and Zooley of Utah, Inc. ("Zooley of Utah"), executing wire transfers and cashiers checks on behalf of these companies, and managing their bank accounts, including the accounts at

Zions First National Bank ("Zions Bank") and Wells Fargo Bank (collectively, the "Utah accounts").

5. In addition, I was the Registered Agent in Utah for PetsMarketing, Inc. ("PetsMarketing") and, for a period of time I was the Controller for PetsMarketing. PetsMarketing conducted all of its operations through its wholly owned subsidiary, PetsMarketing Insurance.com Agency, Inc. ("PMIA"), an Ohio corporation. In my capacity as Controller, I was in charge of the accounts payable and accounting and made payments and disbursements on behalf of PMIA from two Utah bank accounts in its name at Zions Bank.

6. In each of positions I held (as set forth above), I reported to and took instructions directly from Philip [sic] D. David Gubbay ("Gubbay") and considered him to by my ultimate supervisor. Every time I wired significant assets out from the Utah accounts, I did so upon written or telephonic instructions of Gubbay that were faxed from Spain (or elsewhere) to me at the offices of Capital Suisse, Inc. and Zooley of Utah (the "Utah offices"), located at 15 South Temple Street, Salt Lake City, Utah.

7. In early January 2002, Gubbay requested that I remove from the Utah offices and send to Spain all documents and computer data maintained there. After consultation with my lawyer, I refused to do so because I was concerned that complying with those directions would constitute an obstruction of justice in light of the ongoing litigation before this court. I advised Gubbay that I would not comply. Several days later, on January 13, 2002, Andrew Yurcho ("Yurcho"), who is the U.S. in-house counsel and the head of the San Diego office for the Capital Suisse Group of Companies, and Harrison

Beal ("Beal"), the Secretary of Capital Suisse Management, traveled from San Diego to Utah. On January 14, 2002, Yurcho and/or Beal met with Holme Roberts & Owen. On January 15, 2002, Yurcho and Beal removed from the Utah offices all documents and computer data (*i.e.*, computer hard drives) maintained there. I took a leave of absence so that I would not be present when the removal occurred. Among the documents removed were:

a. All books and financial records of Capital Suisse, Inc. and Zooley of Utah;

b. All written instructions from Gubbay directing wire transfers or other disbursements from the Utah accounts;

c. All written and e-mail communications between officers and employees of the Capital Suisse Group in Spain and officers and employees of the Capital Suisse Group in Utah.

8. In reviewing the Verified Complaint and being familiar with the subject matter thereof, many of the documents and data removed from Utah would have directly related to HH&C's claims, including for example:

a. The wire transfer instructions directly from Gubbay;

b. E-mails from myself and others, including Douglas P. Hoyt ("Hoty") and Edward B. Stonehocker ("Stonehocker") concerning the Fund's representations on its website about the Net Asset Value ("NAV") representations concerning independent auditors, representations concerning the role of the Utah office as Administrator of the Fund;

c. Documents corroborating that letters were dictated from Spain, even when sent from Utah;

d. E-mails and other documents showing how and why Gubbay orchestrated the reverse merger for PetsMarketing, as described below.

9. Neither I nor Hoyt nor Stonehocker or anyone else in the Salt Lake City offices of the Capital Suisse Group of companies prepared any net asset valuations for Capital Suisse, S.A.

10. Based on my personal knowledge and involvement with PetsMarketing, including review of certain documents, I can represent that on or about March 20, 2000, in accordance with instructions from Douglas Hoyt (an in-house counsel for the Capital Suisse Group), who was acting on instructions from Gubbay, PetsMarketing which is a Delaware corporation. On or about March 27, 2000, PMIA was incorporated as an Ohio corporation; PMIA subsequently became a wholly-owned subsidiary of PetsMarketing. On or about June 19, 2000, acting on instructions from Gubbay, I opened an account at Zions Bank for PMIA. I was the signatory for that account and was responsible for disbursements necessary for PMIA to conduct day-to-day business; I obtained permission from Gubbay before making large disbursements. On or about August 30, 2000, PetsMarketing had its first private placement of shares. Of the 18,512,000 shares issued, Zooley Services obtained 16,000,000, making it the majority owner of PetsMarketing. In exchange for those shares, Zooley Services transferred to PMIA its portfolio of health insurance policies for family pets. Zooley Services had previously

acquired the portfolio through the bankruptcy proceedings for PetsHealth, an earlier company in the business of selling medical insurance for pets, in which Zooley Services had an interest.

11. Gubbay, acting directly and through Zooley Services, hired Russell Smith (the former President of PetsHealth) as the President of PetsMarketing and Robert Cashman (also a former director of PetsHealth) as the Secretary of PetsMarketing.

12. Yurcho, through Equitrade Securities, Inc. ("Equitrade"), tried to obtain permission from the NASD to quote PetsMarketing on the Pink Sheets LLC ("Pink Sheets") by filing a Form 15c-211 with the NASD. The NASD, however, rejected the Equitrade Form 15c-211 as deficient. Consequently, in April 2001, Gubbay instructed Yurcho who informed me and others that PetsMarketing needed to undergo a reverse merger with LifeSoft, a public shell corporation, *i.e.*, only LifeSoft would survive the merger and be re-named PetsMarketing. Because LifeSoft was already eligible to be quoted in the Pink sheets, it would be possible after the merger for the LifeSoft shares, now called "PetsMarketing" shares, to be quoted in the Pink Sheets. Thus, the merger circumvented the requirement that a new Form 15c-211 be filed in order for PetsMarketing shares to be quoted in the Pink Sheets. LifeSoft was dormant before the merger, and was revived for the purpose of allowing PetsMarketing shares to be quoted on the Pink Sheets notwithstanding the NASD's concerns with Equitrade's Form 15c-211.

13. As part of the reverse merger, Zooley Services was given another nine (9) million share of PetsMarketing,

bringing its ownership total to 25 million shares, or over sixty percent (60%) of the outstanding shares.

14. Nerja Communications ("Nerja"), a company owned actually by Gubbay and nominally operated by Beal (the Secretary of Capital Suisse Management), used its trading account at Equitrade Securities, Inc., a broker-dealer in Orange County, California, to periodically purchase small amounts PetsMarketing shares at prices from approximately $8.00 to $10 per share. To fund Nerja's purchases of PetsMarketing, I wired money, acting on instructions from Gubbay, from the Utah accounts to MJK Clearing, the clearing firm for Equitrade.

15. Included among the wire transfers that I made, or am aware of, from the Utah accounts upon written instructions from Gubbay were:

a. $181,050 to Gubbay's father, Donald Gubbay, in Manley;

b. $250,00 to Gubbay's wife, Veronique Gubbay, another $750,000 to Swiss Finance, S.I., and another $155,000 to Ophir Properties, Limited;

c. $150,000 to Gubbay's sister, Denyse Anne Pentecost, in New Calendonia;

d. $1,027,356 to Marianne Zenger, a sales agent of the Capital Suisse Group, in Spain and Switzerland;

e. $7,291,666 to pseudonym accounts code name "Koukouk" in Switzerland and the Guernsey Islands that I later determined were beneficially owned by Willy Zenger, who is Marianne Zenger's father;

f. $501,000 to Terrence Vandeveld, the Managing director of Capital Suisse Securities, who is also Marianne Zenger's brother-in-law;

g. $1,520,000 to Capital Suisse Management, parent of Capital Suisse Securities;

h. $112,000 to Transmeridian, Inc. for the benefit of William Slivka, the President of Capital Suisse Securities;

i. $75,000 to the Charleston Group for the benefit of Robert Cashman, Secretary of Capital Suisse Securities;

j. $300,042 to Andrew Yurcho, in-house counsel for the Capital Suisse Group;

k. $96,000 to the Maro Group for the benefit of Roy Lerman, Head of Marketing for the Capital Suisse Group;

l. $328,750 to Yves George Larielle, a Vice President of Capital Swisse Group, in Gibraltar;

m. $464,230 to Tul Intervest in Gibraltar, Larielle is sole signatory to account;

n. $315,000 to Elite Trading in Gibraltar, Larielle is sole signatory on account;

o. $75,000 to Holme Roberts & Owen;

p. $367,566 to Mark Hendricks, a General Counsel and Senior Vice President of the Capital Suisse Group of companies; and

q. $252,000 to Norja Communications, In.c, the company that bought PetsMarketing stock as set forth above.

r. $4.95 million to Donald Gubbay in Vanuaru ($4.5 sent by Douglas P. Hoyt).

These amounts total $19,161,660.00.

DATED this 22nd day of May 2002.

/s/ Dave E. Smith
Dave E. Smith
AFFIANT

SUBSCRIBED AND SWORN TO before me this 22nd day of May 2002.

/s/ Dawn M. Hales
NOTARY PUBLIC

NOTARY PUBLIC
DAWN M. HALES
4095 S. Kifferney Circle
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My Commission Expires
February 3, 2004
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IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE, Plaintiff, vs. PHILIPPE DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, AND JOHN DOES 1-10, Defendants.	**CERTIFICATION OF GOOD FAITH ATTEMPT TO COMPLY WITH COURT ORDER** (ORAL ARGUMENT REQUESTED) Supreme Court No. 20020683 Consolidated Case No. 010905355

Defendants Philip D. Gubbay, Capital Suisse, S.A. (the "Fund"), Zooley Services Limited ("Zooley"), Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland [sic] Limited ("Fernland") (all collectively "Capital Suisse") through their appellate counsel respectfully submit this Certification of Good Faith Attempt to Comply with Court Order.

INTRODUCTION

On August 15, 2002, Capital Suisse appealed the July 17, 2002 Order of the trial court granting Hentsch Henchoz & Cie's ("HH&C") Motion for Summary Judgment and Motion to Dismiss in this matter. The basis of the appeal is that the trial court erroneously failed to enforce a forum selection clause found in each of the agreements at issue in this case. On August 6, 2004, this Court issued an opinion[1] that did not reach the merits of the appeal. Instead, this Court found that Capital Suisse had not complied with the trial court's orders, stayed the appeal, and ordered that Capital Suisse comply with two conditions: First, the Court required Capital Suisse, within thirty days of the its order, to bring itself into compliance with this Court's outstanding orders. Second, the Supreme Court required Capital Suisse to post a bond in the amount of any unsatisfied portion of the judgment that has been entered against it.

The Court remanded the case to the trial court to make the following determinations:

> (1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; (2) the amount of the unsatisfied portion of the district court judgment; and (3) whether Capital Suisse has posted an adequate bond in that amount.

Opinion at 125.

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[1] *See Hentsch Henchoz & CIE v. Gubbay*, ___ P.3d ___, 2004 WL 1753372 (Utah 2004) (herein after referred to as the "Opinion").

Because Capital Suisse's appellate counsel was not its trial counsel, appellate counsel sought to determine what particular orders of the district court had not been complied with as well as to determine Capital Suisse's ability to post a bond. For either of two independent reasons, Capital Suisse has been unable to post a bond. First, Capital Suisse does not have the present financial wherewithal to come close to posting a bond of the magnitude required by the Court. Second, even if Capital Suisse had adequate financial wherewithal, its assets have been frozen by the orders of a Spanish Court.[2] Therefore, it was never possible for Capital Suisse to comply with this Court's requirements. Capital Suisse has, however, made a good faith effort to comply with the Court's requirements outlined in its opinion, and on that basis requests that this Court now reach the merits of its appeal.

CERTIFICATION

I. THE COURT'S REQUIREMENTS THAT CAPITAL SUISSE POST A BOND

One of the Court's two requirements imposed on Capital Suisse was that Capital Suisse post a bond "in the amount of any unsatisfied portion of the judgment that has been entered against it." *Id.* at ¶ 24. HH&C represented to the trial court that this amount totals $27,868,098.63. [Exh. B, HH&C's Memorandum in Opposition to Defendants' Expedited Motion Seeking Declaration

[2] Capital Suisse respectfully notes that nothing has prevented HH&C from seeking to collect on the judgment it obtained while the appeal has been pending, the reason a bond typically is posted.

Regarding Outstanding Orders and Satisfaction of Bond ("HH&C's Opposition Mem.") at p. 13][3]

On remand, Capital Suisse demonstrated to the trial court that it could not post the bond required by this Court for two separate and independent reasons. First, Capital Suisse demonstrated that it lacks the financial ability to post a bond in the amount claimed by HH&C. Second, Capital Suisse demonstrated that there exist several Precautionary Measures and Orders issued by the Spanish Marbella Court in the Spanish Case that strictly prohibit Capital Suisse from accessing any of its remaining assets. Capital Suisse argued to the trial court that the Spanish Court's Orders, which freeze all of Capital Suisse's assets, adequately safeguard Capital Suisse's assets from dissipation and thus satisfy this Court's reason for requiring the bond. *See* Opinion at ¶ 24.

While the Court's Opinion does not state the reason for the Court having imposed the particular requirement of posting a bond, Capital Suisse believes the bond was ordered for the purposes set forth in Utah Rule of Civil Procedure 62(g), which provides:

> Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

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[3] References herein are made to the pleadings filed with the trial court because the record has not yet been updated to include page numbers to these pleadings.

Rule 62 governs the stay of proceedings to enforce a judgment and the rules governing supesedeas bonds that are required for any such stay. [Exh. C, Capital Suisse's Reply Memorandum in Support of Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond ("Capital Suisse's Reply Mem.") at p. 4]. Because this Court held in its decision that its requirement that Capital Suisse post a bond for any unsatisfied portion of the judgment was based on the Court's concern that "any continued delay will lead to the further dissipation of Capital Suisse's assets," or, in other words, to maintain the status quo, Capital Suisse determined that the bond required by the Court is a supercedeas bond. *See Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 702 (Utah 2002) ("the purpose of a supersedeas bond is to protect nonappealing parties by maintaining the status quo during the appeal and insuring that those who have obtained the judgment under review will not be prejudiced by a stay of the judgment pending final determination of the appeal").

Capital Suisse pointed out on remand to the trial court that in dealing with supersedeas bonds, courts have held that the bond may be waived if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond. *See, e.g., HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995) ("the court possesses the power to waive the requirement of a supersedeas bond"). [Exh. A, Capital Suisse's Memorandum in Support of Expeditied [sic] Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond ("Capital Suisse's Opening Mem.") at

pp. 5-6].[4] Capital Suisse directed the trial court's attention to the Tenth Circuit's decision in *Miami International Realty v. Paynter*, 807 F.2d 871 (10th Cir. 1986), in which a jury found Paynter, an attorney, liable for malpractice and awarded the plaintiff $2,100,000. Paynter appealed the decision and moved for a stay of execution of the judgment and a waiver of supersedeas bond. The trial court granted Paynter motion to stay and waived the supersedeas bond. The plaintiff then appealed the trial court's decision.

On appeal, the Tenth Circuit upheld the trial court's waiver of the supersedeas bond. In its decision, the Tenth Circuit noted that trial courts "have inherent discretionary authority in setting supersedeas bonds." *Id.* at 873. It then quoted the following from the Second Circuit's decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (1986):

> A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution. . . . " In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors. . . . A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual

[4] Capital Suisse's Opening Mem. references the Affidavit of Philip Gubbay a copy of which is attached hereto as Exh. H.

> circumstances, would not be unduly endangered. . . .

Id., citing *Wunschel & Small, Inc., v. United States*, 554 F.Supp. 444-45 (U.S.Cl.Ct.1983) (Rule 62(d) does not preclude the court from issuing a stay without a bond or upon the posting of a partial bond); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501, 520-21 (E.D.Pa.1973) (stay of execution granted following defendants' showing of lack of sufficient assets to satisfy the judgment or to obtain a bond in amount thereof and that execution of the judgment would place each of the defendants in insolvency).

The Tenth Circuit, having concluded that a stay of judgment could be obtained under Rule 62(d) without obtaining a supersedeas bond where the party appealing judgment has demonstrated that posting the bond is financially impossible, held that the trial court did not err in granting Paynter's request for stay without a supersedeas bond. The court found that Paynter's motion for a stay was supported by his affidavit in which he stated that he did not have sufficient assets to post a supersedeas bond for the amount of the judgment. *See also HCB Contractors*, 168 F.R.D. at 512 (waiving requirement of supersedeas bond upon finding party lacking assets to post bond). [Exh. A, Capital Suisse's Opening Mem. at pp. 5-7].

Capital Suisse demonstrated to the trial court that it lacks sufficient assets to post the bond required by this Court. [*Id.* at p. 7]. Capital Suisse further demonstrated that all of its attempts to obtain a bond were denied. [*Id.*]. HH&C produced no evidence disputing these facts. Capital Suisse therefore asked the trial court to find that the bond requirement was waived or satisfied because Capital

Suisse had done all it could do in regards to positing a bond. [*Id.*].

Capital Suisse also demonstrated to the trial court that even if it possessed sufficient assets to post the bond, the Orders by the Spanish Court in the Spanish Case that freeze all of Capital Suisse's assets would prevent Capital Suisse from posting a bond. [*Id.*]. The Order requires the "freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets" of Capital Suisse in all jurisdictions where Capital Suisse has assets, including Spain, Gibraltar, Amsterdam, New York and Salt Lake City. [*Id.* at pp. 7-8]. These Orders remain in effect at the present time. [*Id.* at p. 8]. Capital Suisse argued to the trial court that because the Orders entered in the Spanish Case prohibit the disposal (in any form) of any of the assets of Capital Suisse, any attempt by Capital Suisse to post the bond required by this Court would violate the Orders and, moreover, the Spanish Court Orders effectuated the purpose of this Court's Opinion requiring the posting of a bond. [*Id.*].

In support of its argument, Capital Suisse cited Utah Rule of Civil Procedure 62(i)(2), which provides "Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d)." [Exh. A, Capital Suisse's Opening Mem. at p. 8]. Capital Suisse also directed the trial court's attention to *D'Aston v. D'Aston*, 790 P.2d 590 (1990), a decision relied upon heavily by this Court in its Opinion in this case, that a party seeking a stay "merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard [its] assets from dissipation pending her

appeal." *Id.* at 594. [*Id.*]. Capital Suisse argued that the Orders entered in the Spanish Case, which freeze all of Capital Suisse's assets, provide an alternative safeguard of Capital Suisse's assets from dissipation. *See Paynter*, 807 F.2d at 874 (finding trial court's order enjoining the transfer or disposing of any assets a sufficient alternative safeguard to supersedeas bond); *see also HCB Contractors*, 168 F.R.D. at 514 (holding an order restraining the transferring of judgment debtors assets sufficient alternative security to waive supersedeas bond). [Exh. A, Capital Suisse's Opening Mem. at p. 8].

Capital Suisse noted to the trial court that the clear desired intent of this Court's requirement that Capital Suisse post a bond is to protect HH&C from any further dissipation of Capital Suisse's assets. [*Id.* at p. 9)]. It then argued that because Capital Suisse's assets are frozen pursuant to the Spanish Court's Orders, there is no threat that Capital Suisse's assets will be dissipated pending the appeal of this matter. [*Id.*]. Capital Suisse therefore asked the trial court to find that this Court's bond requirement is unnecessary as it will provide no additional protection to HH&C in this regard. [*Id.*].

In its Opposition to Capital Suisse Motion, HH&C argued that this Court's opinion clearly states that Capital Suisse must post a bond or the appeal is dismissed. [Exh. B, HH&C's Opposition Mem. at p. 9]. In other words, HH&C argued that the Court's Opinion granted the trial court no discretion to determine whether Capital Suisse was unable to post a bond or whether it had provided adequate alternative safeguards. [*Id.* at pp. 9-10].

At the hearing on Capital Suisse's Motion, the trial court agreed with HH&C's position. It found that it only

had authority on remand to determine whether Capital Suisse had or had not posted a bond. [Exh. D, Transcript of October 20, 2004 Hearing before Judge Anthony. B. Quinn ("Hearing Transcript") at pp. 3, 5 36.]. The trial court refused to look beyond that fact to Capital Suisse's arguments regarding its inability to post the bond. [*Id.*]. Finding that Capital Suisse had not posted a bond, a fact that is not disputed, the trial court concluded that Capital Suisse had not met the bond requirement in this Court's Opinion. [*Id.* at p. 36].

At the time this Court entered its Opinion requiring the bond, it had no facts before it that would allow it to know it would be impossible for Capital Suisse to post the required bond. In *In the Matter of the Discipline of Jamis M. Johnson*, 48 P.3d 881 (Utah 2002), Justice Durham argued "Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution." *Id.* at 887 (Durham, J., concurring and dissenting). Absent a finding by this Court that the bond requirement has been satisfied in light of the Spanish Court's Orders, or, at a minimum removing the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and has been, in effect, condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. Capital Suisse therefore requests that the Court hold the bond requirement is sufficiently satisfied.

II. THE COURT'S REQUIREMENTS REGARDING OUTSTANDING ORDERS OF THE TRIAL COURT

Capital Suisse's appellate counsel was not Capital Suisse's trial counsel. Without having first-hand background knowledge of the procedural posture of this case, counsel for Capital Suisse attempted to determine what outstanding orders of the trial court existed. Based on a review of the record in this case prior to appeal and conversations with Capital Suisse, counsel for Capital Suisse believed the only outstanding order from the Court that Capital Suisse had failed to comply with was the trial court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation (as specifically noted in the Court's Opinion at ¶ 24).

Capital Suisse's counsel also spoke to HH&C's counsel regarding which orders of the trial court remained outstanding.[5] HH&C's counsel responded that the documents that had been removed from Utah needed to be produced and that there may be an issue with respect to Capital Suisse's responses to interrogatory and document requests. Based on the fact that HH&C had been provided the information sought by the discovery requests and given the fact that HH&C's counsel was indefinite as to

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[5] The reason why Capital Suisse contacted HH&C's counsel was to determine exactly what discovery HH&C still considered it needed, given the fact that a default judgment had already been entered in this case. It makes absolutely no sense to Capital Suisse that it be required to produce discovery on issues that have been resolved by entry of the default judgment.

whether HH&C believed interrogatory and document requests still required further response, Capital Suisse believed that the Court's requirement as it related to Capital Suisse's compliance with the outstanding orders of the trial court would be satisfied by returning the documents removed from Utah.

Capital Suisse returned all documents and/or materials it had removed from Utah in its control and possession on September 3, 2004. [Exh. E Second Affidavit of Philip Gubbay at p. 3]. The materials thereafter were immediately made available to HH&C's counsel for review. [Exh. B, HH&C's Opposition Mem. at p. 8; Exh. F, Letter to HH&C dated September 3, 2004]. Also on September 3, 2004, Capital Suisse filed with the trial court an expedited motion seeking a declaration from the trial court that by returning the materials removed from Utah, it had complied with the court's remaining outstanding orders as required by this Court's Opinion. [Exh. A, Capital Suisse's Opening Mem.]. HH&C filed an opposition to Capital Suisse's Motion on September 20, 2004. [Exh. B, HH&C's Opposition Mem.].

In its opposition, HH&C claimed that Capital Suisse has not adequately complied with the orders of this Court because (1) Capital Suisse's production of the documents removed from Utah was insufficient and that (2) Capital Suisse has failed to respond to HH&C's interrogatories and document requests. In particular, HH&C claimed that the responses to its discovery requests were necessary to trace nearly $25 million that was allegedly fraudulently obtained by Capital Suisse. [Exh. B, HH&C's Opposition Mem. at p. 3]. HH&C alleged that its discovery requests sought the most fundamental information – i.e., "how and where the Capital Suisse Defendants had hidden and

laundered HH&C's $25 million, and where it was located." [*Id.* at pp. 5-6].

In regards to the materials returned to Utah, HH&C relied on the affidavit of a former employee of Capital Suisse, David Smith, who HH&C claims stated that the materials removed from Utah included (a) computer hard drives, (b) records of wire transfers and financial records of Zooley of Utah, and (c) emails regarding an entity named PetsMarketing. HH&C claimed that these materials were not included in Capital Suisse's production of the materials removed from Utah. [*Id.* at pp. 8-9].

In its Reply Memorandum, Capital Suisse demonstrated to the trial court that despite HH&C's claim to the contrary, Capital Suisse in fact had returned all documents in its control and possession it removed from Utah. Capital Suisse demonstrated that as a result of this case and the orders freezing all of the assets of Capital Suisse issued in *In the Matter of: The Criminal Proceeding of the Kingdom of Spain and Hentsch, Henchoz & Cie against Philip David Gubbay*, Court of First Instance and Instruction No. 2 Marbella, Court No. 1346/2000 (the "Spanish Case"), which involves the same issues and has been consolidated with this case, Capital Suisse was unable to pay its employees. [Exh. C, Capital Suisse's Reply Mem. at p. 3; Exh. E, Second Affidavit of Philip Gubbay at ¶ 10-11]. Some of the disgruntled employees, in order to retaliate against or pressure Capital Suisse to pay their wages, in turn, stole or destroyed equipment, documents, computers, and other assets of Capital Suisse, including some documents, computers, equipment and other materials that had been removed by Capital Suisse from Utah. [*Id.*, Exh. E, Second Affidavit of Philip Gubbay at ¶¶ 14-16]. In complying with the trial court's outstanding order, Capital

Suisse returned **all** of the documents it had. To the extent there are computer hard drives or other documents in its possession and/or control, Capital Suisse demonstrated that it had returned them to Utah. [Exh. C, Capital Suisse's Reply Mem. at 3, Exh. E, Second Affidavit of Philip Gubbay at ¶¶ 14-16].

Capital Suisse also demonstrated that HH&C's claim that the wire transfer records and financial records for Zooley were absent was disingenious. Capital Suisse directed the trial court's attention to the Appendix to HH&C's Memorandum of Points and Authorities in Support of Motion for Summary Judgment on the First, Second and Sixth Claims Against Capital Suisse Defendants ("HH&C's Summary Judgment Mem.") at Nos. 27 and 28, in which HH&C attached copies of the bank records and wire transfer records for Zooley of Utah. [Exh. C, Capital Suisse's Reply Mem. at p. 1]. Thus, HH&C already had in its possession the information it claimed was absent from Capital Suisse's production of the documents removed from Utah.

Finally, Capital Suisse demonstrated to the trial court that it did not possess the information on PetsMarketing that David Smith claimed in his Affidavit was sent to Spain. [Exh. E, Second Affidavit of Philip Gubbay at ¶ 16)]. While the materials Capital Suisse returned to Utah contained a few emails mentioning PetsMarketing, those emails were drafted by Douglas Hoyt in his capacity of general counsel for Capital Suisse and are protected under the attorney client privilege and thus not required to be produced. Capital Suisse prepared a privilege log containing this information that it made available to counsel for HH&C. [Exh. G, Letter to HH&C dated October 19, 2004.] HH&C made no attempt to demonstrate

why the information is relevant and Capital Suisse understands that HH&C made no attempt to subpoena any of the information regarding PetsMarketing from PetsMarketing.

In response to HH&C's argument that Capital Suisse failed to comply with the trial court's outstanding orders by failing to respond to its interrogatories and discovery request, Capital Suisse demonstrated to the trial court that HH&C already possesses the information it sought to discovery in its discovery requests. Capital Suisse again directed the trial court's attention to the Appendix to HH&C's Summary Judgment Memo. at Nos. 27 through 28, in which HH&C attached copies of the Utah bank records of Capital Suisse during the period when HH&C alleges that Capital Suisse laundered its money out of the Utah banks accounts all over the world. [Exh. C, Capital Suisse's Reply Memo. at p. 1]. Capital Suisse also noted to the trial court that also attached is a detailed flow chart prepared by HH&C that analyzes the flow of HH&C's funds for the transaction at issue. [*Id.*] In addition, Capital Suisse pointed out to the trial court that in the documents removed from Utah that Capital Suisse returned are all of the financial records for Capital Suisse's operations in Utah. [*Id.*].

Capital Suisse also drew the trial court's attention to the fact that HH&C recently represented in the Spanish Case, in opposition to a motion by Capital Suisse seeking to extend discovery in that case, that HH&C's discovery is sufficient, there is no need for further discovery, and that a trial date should be set. [*Id.* at p. 2].

Capital Suisse, on the remand of this matter to the trial court, argued that, given its representation to the

Spanish Court in a case consolidated with this one, HH&C cannot, in good faith, now claim that it does not have the discovery it has requested from Capital Suisse. [*Id.*]. HH&C already possesses that very information.

In a good faith effort to comply with this Court's Opinion, Capital Suisse also diligently endeavored to secure documents and materials in the possession and/or control of third parties prior to the hearing on its Motion. Capital Suisse was able to locate a data tape containing information from one of the computer hard drives removed from Utah that was in the possession of an attorney in California. Upon receipt of the data tape in Utah, counsel for Capital Suisse immediately made it available to HH&C for review and copying. [Exh. G, Letter to HH&C dated October 19, 2004.] HH&C declined Capital Suisse's invitation to review and copy the tape.

Capital Suisse also produced copies of its financial and accounting records that Capital Suisse ultimately had to purchase from one of its disgruntled former employees who had taken the records when he left Capital Suisse. [*Id.*] These records were also made available to HH&C for review. HH&C also declined the invitation to review these records.

In addition, Capital Suisse produced copies of its audits performed during the relevant years to this case. [*Id.*] HH&C again rejected Capital Suisse's invitation to review these audits.

After producing these documents in Utah, Capital Suisse prepared responses to Capital Suisse's Second Set

of Interrogatories and Document requests, which it served on HH&C on October 19, 2004.[6]

III. CAPITAL SUISSE DID EVERYTHING REASONABLY WITHIN ITS POWER TO COMPLY WITH THIS COURT'S OPINION

In an effort to comply with this Court's Opinion so that the merits of its appeal may be reached by this Court, Capital Suisse acted in good faith and did everything reasonably within its power. At the hearing held on Capital Suisse's Motion on October 20, 2004, the trial court found that its hands were, in effect, bound by the extremely limited instructions contained in this Court's Opinion. The trial court held that because it had determined that some discovery was produced outside the thirty-day limit set by this Court, even if Capital Suisse had now fully complied with the trial court's outstanding orders, the court was "not in a position to determine whether there has been full compliance outside the 30 days.[7] [Exh. D. Hearing Transcript at pp. 34-35]. The trial court therefore concluded that the Court's requirement

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[6] The Second Set of Interrogatories and Document Requests contains essentially identical requests to those in HH&C's First Set of Interrogatories and Document Requests in addition to numerous other requests. Because the Second Set encompassed all information sought by the First Set, Capital Suisse responded to the Second Set.

[7] Again, Capital Suisse firmly believes that the information sought by HH&C's discovery was provided to HH&C within or prior to the thirty-day period established by the Court. When HH&C thereafter complained that an issue still allegedly existed with respect to Capital Suisse's discovery responses, out of an abundance of caution, Capital Suisse prepared specific written responses and obtained additional documents from a third party.

regarding the outstanding orders had not been met by Capital Suisse. [*Id.* at p. 35].

Disregarding what Capital Suisse believes was the spirit and intent of this Court's Opinion, HH&C has, of course, argued (and will again argue) that because Capital Suisse did not strictly satisfy this Court's Opinion (and irrespective of whether Capital Suisse could comply), this Court should not reach the merits of Capital Suisse's appeal. Capital Suisse requests that this Court determine that Capital Suisse has made a good faith effort sufficient to address this Court's concerns such that the Court will reach the merits presented by Capital Suisse's appeal.

Absent this, Capital Suisse asks the Court to require the trial court to (1) determine whether a bond is necessary given that Capital Suisse has not sought a stay of execution of judgment on appeal; and (2) conduct an evidentiary hearing to determine whether the discovery produced by Capital Suisse sufficiently responds to HH&C's request for discovery seeking "how and where the Capital Suisse Defendants had hidden and laundered HH&C's $25 million, and where it was located," which HH&C admits is the only relevant discovery remaining in this case.

RESPECTFULLY SUBMITTED this 4th day of November, 2004.

HATCH, JAMES & DODGE

By: Brent O. Hatch
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Attorneys on Appeal for Defendants

IN THE SUPREME COURT OF THE STATE OF UTAH

Hentsch Henchoz & Cie,
Plaintiff/Appellee,

v. Case No. 20020683-SC

Philippe D. David Gubbay; Capital Suisse, S.A.; Capital Suisse Securities, Inc.; Capital Suisse, Inc.; Zooley Services Limited; Zooley of Utah, Inc.; Fernland Limited; Douglas P. Hoyt; and John Does 1-10,
Defendants/Appellants.

ORDER

(Filed Nov. 10, 2004)

This matter is before the court on its own order to show cause.

IT IS HEREBY ORDERED that Appellants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited show cause why this court should not dismiss their appeal for failure to comply with this court's decision in the above-captioned matter. *See Hentsch Henchoz & Cie v. Gubbay,* 2004 UT 64.

The Appellants' brief is to be filed on or before 5:00 p.m., November 24, 2004. The Appellee Hentsch Henchoz and Cie's brief is to be filed on or before 5:00 p.m., December 8, 2004. Briefs should be filed with the Clerk of the Court and should not exceed fifteen (15) pages in length.

Extensions in briefing length or time will not be permitted.

FOR THE COURT:

Nov. 10, 2004
Date

/s/ Michael J. Wilkins
Michael J. Wilkins
Justice

LAW OFFICES
HATCH, JAMES & DODGE
[Address Omitted In Printing]

November 24, 2004

VIA HAND-DELIVERY

Clerk of Court
Utah Supreme Court
450 South State
Salt Lake City, Utah 84114

Re: Hentsch Henchoz & CIE v. Gubbay, *et al.*, Case No. 20020683-SC

Dear Clerk:

We have recently received from the Court a copy of an Order to Show Cause in the above-referenced matter dated November 10, 2004. The Order requires Defendants to submit a brief demonstrating cause why the Court should not dismiss Defendants' appeal.

On November 4, 2004, Defendants filed with the Court their Certification of Good Faith Attempt to Comply with Court Order (the "Certification"). Please regard the Certification as Defendants' brief in response to the Court's Order to Show Cause. The Certification is fifteen (15) pages in length, exclusive of cover sheet and signature block, as required by the Court.

If you have any questions regarding this matter or if there are any concerns regarding the form or length of the Certification, please do not hesitate to contact me.

Sincerely yours,

/s/ Brent O. Hatch
Brent O. Hatch

c: Walter A. Romney, Esq.

IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE, Plaintiff and Appellee, vs. PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10, Defendants and Appellants.	Supreme Court No. 20020683-SC

BRIEF OF APPELLEES IN OPPOSITION TO APPELLANT'S CERTIFICATION OF GOOD FAITH ATTEMPT TO COMPLY WITH COURT ORDER

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INTRODUCTION

In its Opinion in *Hentsch Henchoz & Cie v. Gubbay*, 2004 UT 64 ("Opinion"), this Court ordered Capital Suisse to satisfy two conditions: (1) post a bond in the entire amount of the outstanding judgment (approximately $27 million) within ninety days, and (ii) within thirty days, comply with the outstanding orders of the trial court. *See* Opinion, ¶ 24. This Court imposed these conditions to remedy defendants' "defiance," "disobedience," and "insubordination" of the district court and its orders. *Id.*, ¶ 18. In so ruling, this Court emphasized that

> "the processes of the appellate court are [only] available to one who recognizes his responsibility

> to obey court orders while they remain in effect," and "a litigant is not free to determine to what extent he will comply with the law."

Id, ¶ 19, quoting *Schmidt v. Schmidt,* 610 A.2d 1374, 1377 (Del. 1992).

Following argument on October 20, 2004, the district court determined that Capital Suisse failed to satisfy either of these express conditions.[1] Nonetheless, Capital Suisse submits a "Certification" to this Court that it made a "good faith" attempt to satisfy them. Its "Certification" is replete with vagaries, half-truths, and omissions, however, and its assertion of "good faith" is a sham. Capital Suisse has not attempted to satisfy this Court's express conditions, but instead to evade them and preserve the fruits of its fraud and its willful disobedience of the district court's orders.

As this Court knows too well by now, Capital Suisse stole $25 million from HH&C, laundered it through Salt Lake City bank accounts to family and friends all over the world, repeatedly refused to tell HH&C where its money was, and removed documents to Spain to prevent HH&C from finding out. To avoid this Court's express condition, Capital Suisse claims that a bond is unnecessary, because its assets have been frozen by the Spanish Criminal Court. What Capital Suisse fails to disclose, however, is that only about $600,000 has been frozen, none of it part of HH&C's $25 million. It is supremely ironic that Capital Suisse asserts that these orders of the Spanish Criminal Court prevent dissipation of HH&C's $25 million, when Capital

[1] The Order is reprinted in the Addendum ("Add.") to this Brief, at pages 1-3.

Suisse violated those orders by transferring the money out of the Gibraltar and Salt Lake City bank accounts. Nothing short of the bond ordered by this Court will prevent dissipation of HH&C's $25 million, or remedy Capital Suisse's willful disobedience of the district court.

Equally important, Capital Suisse did not comply with the outstanding orders of the district court. Within the 30-day deadline set by this Court, Capital Suisse did not return to Utah all the documents removed to Spain (in violation of the district court's March 25, 2002, order), and did not answer HH&C's interrogatories or respond to its documents requests (pursuant to the district court's November 15, 2001 and February 8, 2002 orders). The afternoon before the district court hearing to determine whether Capital Suisse had complied with this Court's express conditions, Capital Suisse purported to return additional documents that had been removed from the offices of Capital Suisse's Utah affiliates, and to respond to HH&C's interrogatories and document requests. Even this belated attempt did not comply with this Court's express conditions, because Capital Suisse still has not returned all the removed documents to Utah. It did not answer the vast majority of interrogatories, but instead simply referred HH&C to the documents returned from Spain. Those documents are now more than three years old, and do not answer HH&C's central questions – where is its money now? Capital Suisse has failed or refused to provide current information, and failed or refused to produce documents from its "worldwide headquarters" in Marbella, Spain.

Consequently, and in accordance with the explicit instructions in its Opinion, this Court should dismiss Capital Suisse's appeal without further notice. To do

otherwise would enable Capital Suisse to continue to "determine to what extent it will comply with the law," *id.*, and reward its disobedience and insubordination.

ARGUMENT

I. DESPITE THE COURT'S EXPRESS CONDITION, CAPITAL SUISSE ADMITTEDLY FAILED TO POST A BOND IN THE FULL AMOUNT OF THE JUDGMENT.

This Court noted in its Opinion that the district court entered summary judgment in the amount of $24,730,000, plus interest. *See id.*, ¶ 11. This Court stated unequivocally that Capital Suisse must post a bond for the "unsatisfied portion of the judgment" *Id.*, ¶ 24. Capital Suisse attempts to excuse its admitted failure to post the necessary bond by claiming (i) that it does not have the financial "wherewithal" to post the bond, and (ii) the bond is unnecessary because Capital Suisse's remaining assets were frozen by the Spanish Criminal Court, which "effectuated the purpose of this court's Opinion requiring the posting of a bond." Certification of Good Faith Attempt to Comply with Court Order ("Cert."), at 7.

A. A Bond is the Only Meaningful Remedy for Capital Suisse's Contempt of Court, and to Prevent Further Dissipation of HH&C's $25 million.

Throughout its Certification, Capital Suisse never informs this Court how much money has been frozen in the accounts in Spain or Gibraltar, or the source of the money. To do so would squarely undercut Capital Suisse's assertions that it lacks the "wherewithal" to post a bond,

or that the Spanish Criminal Court orders protect HH&C against dissipation of its $25 million.

Only about $540,000 remains in the Gibraltar account, and about $60,000 in the Spanish account, *See* Affidavit of Luis Juega Garcia, Add., at pages 4-6, ¶¶ 11-12. None of HH&C's $25 million remains in either account, because Capital Suisse wired it to family and friends all over the world to evade the freeze orders.

As this Court will recall, HH&C made seven wire transfers to the Gibraltar account between December 2000 and March 2001. There can be no question that Gubbay directed HH&C to wire its money to the Gibraltar account to evade the May 25, 2000, Spanish Criminal Court order freezing the account in Spain. Capital Suisse then wired HH&C's $25 million from the Gibraltar account to the Salt Lake City accounts at Wells Fargo and Zions Bank, and from those accounts to Gubbay's family and friends throughout the world. Many of the transfers occurred after the Spanish Criminal Court froze the Gibraltar account on May 15, 2001, and the Salt Lake City accounts on May 17, 2001. Indeed, this Court noted that between June 26 and July 25, the Zions account went from a balance of $2,207,006.04 to $804,468.31. *See* Opinion, ¶ 6 & n. 1. A week later, only about $150,000 remained in the Salt Lake City accounts. *See* Brief of Appellees ("Br. App."), Statement of Facts, ¶¶ 38, 43.

Specifically, and without limitation, Gubbay directed the following transfers out of the Salt Lake City accounts:

- Gubbay's father, Donald Gubbay, received $5.31 million, mostly wired to his account in Port Vila, Vanuatu, a South Pacific island known as a money laundering center and tax haven, including transfers

on May 21, June 5 (twice) June 28, and Aug. 2, 2001;

- Gubbay's wife, Veronique Gubbay, received $1.1 million, including transfers to accounts in France on May 18, June 7, and July 17, 2001;
- Gubbay's sister, Denyse Anne Pentecost, received $150,000, including $75,000.00 wired to an account in New Caledonia on June 5, 2001;
- Marianne Zenger, the insider who "introduced" Gubbay to HH&C, received more than $1 million, including $441,000 on June 6, 2001; and
- more than $7 million was wired to an account in Switzerland under the psuedonym recipient identified as "Koukouk" received more than $7 million.

See id., ¶¶ 47-48.

Because HH&C's $25 million is not subject to the Spanish Criminal Court orders, Capital Suisse's assertion that those orders protect HH&C from further dissipation, is false and utterly disingenuous. Without a bond, Gubbay and his family can dissipate it with impunity. Moreover, Gubbay has repeatedly violated the very orders that he now asserts protect HH&C. When asked in the Spanish Criminal proceeding, whether he had ordered the transfer of funds in violation of the May 17 order, Gubbay asserted his privilege against self-incrimination. *See id.* But Gubbay's Affidavit appended to Capital Suisse's Certification conclusively establishes the violations. Indeed, had Gubbay obeyed the Spanish Criminal Court orders at the time, HH&C in all probability would never have been forced to

seek relief in the Utah courts to preserve and to recover its money.[2]

Capital Suisse cites several decisions for the proposition that a court may waive a bond "if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond." Cert., at 5. Not one of these decisions is relevant. Unlike this Court, not one of these courts required a bond as a remedy for a party's "defiance," "disobedience," and "insubordination" of the district court. Further, not one of these courts did what Capital Suisse asks this Court to do – excuse it from posting any bond whatsoever. In fact, each court required alternative security in lieu of a bond. Most important, not one of those defendants did what Gubbay and Capital Suisse did here – steal the plaintiffs' money, place it beyond the jurisdiction of the court, and refuse to return it. Despite Capital Suisse's artful protestation that it lacks

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[2] Gubbay summarized the Spanish Criminal Court orders in the following terms:

> 5. On approximately July 25, 2000, the Spanish Marbella court entered a Precautionary Measure, ordering that all of my personal assets and the assets of all companies under my direction and control in Spain be frozen. This precautionary Measure became effective indefinitely on approximately January 24, 2001. The July 25, 2000 Precautionary Measure remains in effect at this time.
>
> 6. On approximately May 15, 2001, the Spanish Marbella court extended the July 25, 2000 Precautionary Measure to include the assets held by myself and the Fund in Gibraltar, Amsterdam, and New York City. . . .
>
> 7. The Spanish Marbella Court further extended the July 25, 2000 Precautionary Measure on approximately May 17, 2001, to include the Wells Fargo Bank and Zions First National Bank accounts in Salt Lake City of myself, the Fund and Zooley. . . .

Affidavit of Philip D. Gubbay, Cert., Ex. H, ¶ 5.

the "wherewithal" to post a bond, there can be no question that Gubbay and those he controls have HH&C's $25 million, or very large portions of it.[3]

By wiring HH&C's $25 million to foreign bank accounts held by family and friends, Gubbay and Capital Suisse have nullified the effectiveness of HH&C's Utah judgment. This Court's express condition that Capital Suisse post a bond for the entire amount of the judgment, is the only meaningful remedy for Capital Suisse's disobedience of the district court orders. Because Capital Suisse has failed to post the required bond, this Court should dismiss Capital Suisse's appeal without further notice.

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[3] In *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501 (E.D. Pa. 1973), the court waived a supersedeas bond to secure a $1.2 million judgment, but (i) placed in escrow all of the defendant company's stock in escrow; (ii) placed in escrow the individual defendants' shares of other securities and cash, (iii) required the individual defendants to post an [sic] cash bond of $100,000; and (iv) placed severe restrictions on the defendants ability to pay out any monies. *See* 368 F. Supp. at 520-21. In *Miami Int'l. Realty Co. v. Poynter*, 807 F.2d 871 (10th Cir. 1986), the Tenth Circuit waived a supersedeas bond to secure a $2.1 million judgment in a legal malpractice action, but placed in escrow $500,000, the limits of the firm's malpractice coverage. *See* 807 F.2d at 874. In *HCB Contractors v. Rouse & Assoc.*, 168 F.R.D. 508 (E.D. Pa. 1995), the court froze the transfer of substantial real estate assets, and permitted liens to be filed against them. See 168 F.R.D. at 514.

II. CAPITAL SUISSE FAILED TO COMPLY WITH THE ORDERS OF THE DISTRICT COURT.

A. Capital Suisse Did Not Return All Documents Removed from Utah or Respond to HH&C's Discovery Requests Within Thirty Days.

In its Opinion, this Court specifically and expressly held that

> Capital Suisse must, within thirty days from the date of this decision, [to] bring itself into compliance with the orders of the district court in this matter, including those orders requiring Capital Suisse to comply with discovery and to return all of the requested documents and evidence to Utah.

Opinion, ¶ 24. The relevant district court orders included (i) its March 25, 2002, order requiring Capital Suisse to return from Spain all documents that had been removed from the offices of Capital Suisse's Utah affiliates, and (ii) its November 15, 2001, and February 8, 2002, orders requiring Capital Suisse to Respond to HH&C's First and Second Sets of Discovery, which included interrogatories and documents requests.

The thirty days expired not later than Tuesday, September 7, 2004. By correspondence dated September 3, 2004, Capital Suisse informed HH&C (through counsel) that materials removed from the Utah subsidiaries to Spain were available for inspection. Upon inspection, HH&C found that the documents were not organized, and that many had merely been dumped into a box. No index existed. *See* Affidavit of Walter A. Romney, Jr., Add. Pages 15-20, ¶¶ 3-6.

Even without an index, however, it was clear that Capital Suisse had not returned all of the documents and materials removed to Spain.[4] Obviously missing were computer hard drives, compact and/or floppy disks, and other electronic data specifically removed and ordered to be returned. There were no records of wire transfers or financial records of Zooley of Utah. There were a few random e-mails, but not the e-mails or other documents showing (i) how and why Gubbay orchestrated the reverse merger with PetsMarketing, Inc., (ii) how Capital Suisse calculated its net asset valuation, or (iii) investments made by Capital Suisse. All of these were materials identified by David Smith as removed to Spain. *See id.*, ¶¶ 7-12.

Aside from its failure to return all documents removed from Utah within thirty days, Capital Suisse made not the slightest attempt to answer HH&C's interrogatories or to produce documents maintained by Capital Suisse at its "worldwide headquarters" in Marbella, Spain. That failure is simply inexcusable. Nonetheless, Capital Suisse asks to be excused from this failure, because it

> believed the only outstanding order from the Court that Capital Suisse had failed to comply with was the trial court's March 25, 2002 Order

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[4] All of these documents and materials were identified in the affidavit of David Smith, an officer and employee of Capital Suisse's Utah affiliates. In January 2002, Gubbay directed Smith to ship all documents and records from Capital Suisse's Utah offices to Spain. Smith refused, but two other representatives of Capital Suisse flew to Salt Lake City and shipped all documents, records, computer hard drives, and other data, to Spain. *See* Br. App., Statement of Facts, ¶ 55. Smith's Affidavit is reprinted in the Addendum to this Brief, at pages 7-14.

> requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation (as specifically noted in the Court's Opinion at ¶ 24).

Cert., at 10.

This assertion defies credulity, and strongly belies Capital Suisse's claim of "good faith." This Court specifically referenced the HH&C's interrogatories in its Opinion, when it noted that the District Court had

> ordered Capital Suisse to comply with *HH&C's outstanding discovery requests,* which it noted had been outstanding for "some time." In response, Capital Suisse invoked the Fifth Amendment privilege against self-incrimination and otherwise refused to answer. Capital Suisse's privilege claim was also denied by the district court, and the court *again ordered Capital Suisse to answer the interrogatories* and ordered all of the Capital Suisse defendants to answer the complaint.

Opinion, ¶ 9 (emphasis added). Moreover, HH&C's Brief of Appellees repeatedly referenced the outstanding discovery requests, and summarized many of the interrogatories that Capital Suisse had refused to answer. *See generally,* Br. App., Statement of Facts, ¶¶ 52-55 & n. 5. Finally, Capital Suisse admits that HH&C's counsel identified the outstanding interrogatories among the orders of the district court. *See* Cert., at 10.

There simply is no "good faith" explanation for Capital Suisse's failure to comply with the district court's orders within thirty days. Pursuant to its Opinion, therefore, this Court should dismiss Capital Suisse's appeal on the merits.

B. To This Day, Capital Suisse Has Not Complied with the Outstanding Orders of the District Court, but Has Refused to Provide the Most Fundamental Information Requested by HH&C.

Following a hearing on October 20, 2004, the district court entered its order determining that Capital Suisse had not complied with the express conditions set [sic] in this Court's Opinion. The afternoon before the hearing, Capital Suisse notified counsel for HH&C that additional documents had been returned to Utah from Spain. That same day, Capital Suisse purported to serve on HH&C its Response to Plaintiffs' Second Set of Discovery Requests ("Response"). A copy is attached to the Addendum at pages 21-48. These last-minute maneuverings, however, still do not comply with the district court's outstanding orders.

First, Capital Suisse has not returned all of the documents removed from the offices of the Salt Lake subsidiaries. Capital Suisse still has not returned documents relating to PetsMarketing, documents relating to alleged investments by Capital Suisse, still has not returned e-mails, correspondence, or memos relating to investments or investment decisions. Capital Suisse purports to have found one of the several computer hard drives removed from the offices, but has not returned the others. Indeed, Capital Suisse now claims that it is "impossible" to return all of the documents and computer information removed from the Salt Lake City offices. *See* Cert., at 12. But the "impossibility" of returning all documents and computer materials does not demonstrate "good faith." To the contrary, it demonstrates the prejudice to HH&C caused by Capital Suisse's wilful disobedience of

the district court, and the propriety of this Court's requirement that Capital Suisse return all documents.[5]

Second, Capital Suisse's Response to HH&C's Discovery Requests refuses to disclose any meaningful information. Tellingly, *Capital Suisse does not append its Response to its Certification to this Court,* because that would have displayed the bankruptcy of its purported "good faith." HH&C's interrogatories requested the most fundamental information, including:

- the current location of any and all monies received by any of the defendants from HH&C, directly or indirectly (Interrogatory No. 2); all accounts in which any of HH&C' s monies received by any of the defendants were deposited or transferred (Interrogatory No. 3);
- the current location of any and all monies received by any of the defendants from Capital Suisse Management (Interrogatory No. 4);
- all accounts in which any of Capital Suisse Management Inc.'s monies received by and of the defendants were deposited or transferred, including

[5] Capital Suisse baldly and incorrectly asserts that "HH&C made no attempt to demonstrate why the information is relevant and Capital Suisse understands that HH&C made no attempt to subpoena any of the information regarding PetsMarketing from PetsMarketing." Cert., at 13. The PetsMarketing documents are important because Capital Suisse attempted to redeem PetsMarketing shares to HH&C when HH&C demanded an accounting of its investment. HH&C issued subpoenas to PetsMarketing, after first obtaining Letters Rogatory from Judge Nehring, and to its holding company, its president, its attorney, its transfer agent, and its broker. HH&C's counsel, Walter A. Romney, Jr., and its private investigator flew to Canton, Ohio, and Orange County, California, to personally retrieve documents from PetsMarketing and its agents.

the name of the institution and the account number (Interrogatory No. 5);

- each and every purchase, sale exchange, transfer or other transaction received by any of the defendants from HH&C (Interrogatory No. 6);
- each and every purchase, sale exchange, transfer or other transaction received by any of the defendants from Capital Suisse Securities (Interrogatory No. 7);
- all investment holdings of Capital Suisse, S.A. from November 1, 2000, to date, and the value of each holding (Interrogatory No. 8); and
- all shareholders, officers, and directors or each defendant other than Douglas P. Hoyt and D. David Gubbay, and the percentage of shares held by each shareholder (Interrogatory No. 9).

Capital Suisse provides none of the information requested by these interrogatories. Instead, Capital Suisse asserts that the "information sought" in these interrogatories can be "ascertained from" from the records returned to Utah, and "pursuant to Utah Rule of Civil Procedure 33(d), Capital Suisse refers HH&C to those documents." *See* Response, Add., pages 21-48. As Capital Suisse well knows, the documents are incomplete, relate only to Capital Suisse's Utah affiliates, and are now more than three years old. Further, Capital Suisse has not produced *any* documents from its "worldwide headquarters" in Marbella, Spain

It is axiomatic that a party has a duty to "provide true, explicit, responsive, complete and candid answers to interrogatories, "*Alexander v. F.B.I.,* 192 F.R.D. 50, 52 (D.D.C. 2000), and is "obliged to respond by furnishing

such information *as is available to the party." In re Auction Houses Antitrust Litigation,* 196 F.R.D. 444, 445 (S.D.N.Y. 2000) (emphasis in original). Most important, a party must provide all information known at the time it answers the interrogatories. *See, e.g., Chubb Integrated Systems Ltd. v. National Bank,* 103 F.R.D. 52, 60 (D.D.C. 1984) (when an interrogatory "seeks facts within the knowledge of [the party] *at the time of"* the answer, the party must "disclose the information") (emphasis in original); *Shearson Lehman Hutton, Inc. v. Lambros,* 135 F.R.D. 195, 198-99 (M.D. Fla. 1990) (a party is "required to disclose what information they do possess at the time they respond").

Moreover, Capital Suisse cannot rely on Rule 33(d) to avoid its duty to provide current information. Rule 33(d) is available only if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. *See* U. R. Civ. P. 33(d). Capital Suisse cannot claim in good faith that the burden of identifying the "current location" of HH&C's $25 million is the same for HH&C as it is for Capital Suisse (even if that crucial information were to be found in the documents, which it is not).

Finally, Capital Suisse cannot reference the documents available for inspection, and require HH&C to sift through them in hopes of ascertaining the response. Rule 33(d)[6] does not authorize "document dumps;" a party must

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[6] *See, e.g., Starlight Int'l., Inc., v. Herlihy,* 186 F.R.D. 626, 640 (D. Kan.1999) (a party cannot meet its discovery obligations simply by referring generically to past or future production of documents, but must specifically identify which documents contain the answer; otherwise the party "must completely answer the interrogatory without referring to the documents"); *Miller v. Federal Express Corp.,* 186 F.R.D. 376, 385 (W.D. Tenn. 1999) (a "responding party must specify

(Continued on following page)

specifically identify the document(s) where the answer is found. Capital Suisse has made no attempt to direct HH&C to the documents where the interrogatory answers may be found, because, as Capital Suisse knows, the documents do not include the answers.

As a result of Capital Suisse's failure to comply with these basic principles, HH&C to this day does not know the "current location" of the more than $5 million wired to Gubbay's father in Vanuatu. HH&C still does not know the "current location" of the more than $1 million wired to Gubbay's wife in France, the $150,000 wired to Gubbay's sister, or the more than $1 million wired to insider Marianne Zenger. HH&C's efforts to trace its money, as reflected in the exhibits to its summary judgment memorandum, reached a dead end. Gubbay and Capital Suisse know where HH&C's money is, HH&C does not.

Capital Suisse's assertion that HH&C "already possesses the information it sought to discover," Cert. at 13, is especially misleading. Capital Suisse references a pleading that HH&C filed in the Spanish Criminal Court, stating that there is now sufficient evidence to require Gubbay to stand trial. Cert., at 14. The Spanish proceeding is criminal, not civil – its purpose is to try Gubbay for his crimes, not to recover HH&C's money. Because of Gubbay's privilege against self-incrimination under Spanish law, HH&C does not have the right to review Capital Suisse's documents or to trace its assets. *See* Affidavit of Luis M. Juega

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documents from which answer may be derived with sufficient detail to permit requesting party to locate [them]"); [*Capacchione v. Charlotte-Mecklenburg Schools,* 182 F.R.D. 486, 490 (W.D.N.C. 1998) (a party "abuses the option" in Rule 33(d) "when the party simply directs the [requesting] party to a mass of business records").

Garcia, Add. at pages 4-6, ¶¶ 5-7. HH&C's submission to the Spanish Criminal Court therefore has nothing to do with its long overdue need for honest answers from Capital Suisse here.

In summary, Capital Suisse has not responded to the outstanding orders of the district court in good faith. Its Response, in fact, does nothing more than continue Capital Suisse's steadfast efforts to wire HH&C's money beyond the jurisdiction of the Utah courts, and to block any recovery by HH&C. HH&C's position today is no different than it was three years ago, when Capital Suisse violated the orders of the Spanish Criminal Court freezing its accounts, and the orders of the Utah district court. To hear Capital Suisse's appeal on the merits would reward Capital Suisse for its continued intransigence, because Capital Suisse has done nothing that rectifies its earlier contempt of court.

CONCLUSION

For the reasons stated above, this Court should dismiss Capital Suisse's appeal without further notice. Capital Suisse has not satisfied either of the two conditions imposed by this Court's Opinion. Capital Suisse has not posted a bond, and has not complied with the outstanding orders of the district court.

Respectfully submitted this 8th day of December, 2004.

/s/ Perrin Love
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Supreme Court
JUN 14 2005

No. 04-1365

IN THE

Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

Petitioners,

v.

HENTSCH HENCHOZ & CIE, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Utah

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent Hentsch Henchoz & Cie ("HH&C") has failed to undermine the showing by petitioners ("Capital Suisse") that this case properly presents two important federal issues that deserve to be reviewed and decided by this Court. As shown below, HH&C's various attempts to argue that petitioners waived these issues below, or to explain away the important conflicts created by the decision below, are utterly unpersuasive. The same is true of HH&C's irrelevant and false attacks on petitioners' truthfulness and integrity.[1]

I. THIS CASE PROPERLY PRESENTS AN IMPORTANT DUE PROCESS ISSUE THAT THE COURT BELOW DECIDED ERRONEOUSLY AND IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

With respect to the due process issue raised in the petition, HH&C asks this Court to deny the petition on the basis that petitioners failed to raise the argument below and because, in HH&C's judgment, the Utah Supreme Court decision was narrowly tailored to address a unique set of facts not likely to be replicated. In fact, not only did petitioners raise the due process issue below, but the Utah Supreme Court expressly addressed that question in its decision. More fundamentally, notwithstanding HH&C's efforts to transform the issue presented into a factual question, the Utah Supreme Court's holding that it may extinguish a state-granted constitutional right to appeal by imposing conditions with which compliance is impossible raises an important question of law on which the lower courts are divided, and which this Court has previously shown interest in resolving.

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[1] Respondent erroneously re-captioned the style of the case so that each defendant below is identified as a petitioner. Under this Court's Rule 12(6), however, each party below who did not join in the petition is considered a respondent and thus accorded an opportunity to respond to the petition.

A. The Utah Supreme Court Expressly Addressed the Due Process Issue Raised In The Petition.

Although Capital Suisse clearly raised the due process issue below (*see* App. 135a, Resp. App. 19b), that is irrelevant now because the Utah Supreme Court squarely resolved that issue. As this Court has repeatedly held, "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 697 (1991) (citations omitted).

HH&C blindly claims that the due process issue was "not discussed, analyzed nor decided by the Utah Supreme Court." *See* Resp. Opp. at 11. But that is false. The Utah Supreme Court considered the due process issue and found no violation, stating that this Court "has held that dismissing the appeal of an appellant who willfully defies court orders *does not violate due process*, but rather, may be a reasonable means of safeguarding the collectibility of [a] judgment." App. 12a (emphasis added; citation and internal quotation marks omitted). That is why HH&C itself conceded in the district court, after remand, that "*[t]he Supreme Court specifically addressed due process concerns in its Opinion.*" App. 109 n.7. HH&C's revisionism cannot be reconciled with either the Utah Supreme Court's express language, or with HH&C's own district court concession.

B. The Utah Supreme Court's Decisions Conflict With the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*

HH&C further argues that *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), does not conflict with the Utah Supreme Court's opinions because, according to HH&C, "*Pennzoil* did not address the power of the state appellate court to dismiss

an appeal of a contemptuous appellant." Resp. Opp. at 18. But HH&C's attempt to reframe the issue does not eradicate the conflict. The Second Circuit's *Pennzoil* decision clearly prohibited a State court from placing impossible conditions on a state-granted constitutional right to appeal. *Pennzoil,* 784 F.2d at 1154. In contrast, the Utah Supreme Court determined that it *could* impose unachievable threshold requirements on Capital Suisse before it could appeal, notwithstanding the fact that neither the Utah Supreme Court nor the district court had ever found Capital Suisse in contempt. Accordingly, there is an inherent conflict between *Pennzoil* and the decision below.

C. The Utah Supreme Court's Decisions Conflict With Due Process Principles Established By This Court.

HH&C also contends that the Utah Supreme Court's decisions were "[f]ully [c]onsistent" with this Court's decisions because "the Utah Supreme Court, as well as the district court, decided that Capital Suisse's 'good faith' efforts were insufficient to comply with the district court's prior discovery orders." Resp. Opp. at 22. The record emphatically belies this claim, and instead demonstrates that neither the Utah Supreme Court nor the district court ever considered whether Capital Suisse made good faith efforts to satisfy the Utah Supreme Court's discovery and bond requirements.

On remand, for example, the district court bluntly stated that its role in determining compliance was "pretty limited," and suggested instead that Capital Suisse raise with the Utah Supreme Court the issue of whether its inability to comply may excuse its partial non-compliance. App. 105a, 107a. The Utah Supreme Court, however, issued but a two-sentence opinion summarily dismissing the appeal on the sole ground that petitioners "have failed to comply with this court's decision[.]" App. 18a. Nowhere does the Utah Supreme Court even hint that it considered Capital Suisse's arguments

that its good faith efforts to comply should be deemed sufficient.

On the merits, HH&C argues that this Court's opinions demonstrate that "dismissal of an appellant's appeal does not violate due process when the appellant defies a lower court's orders." Resp. Opp. at 22 (citing *Nat'l Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954); *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909); and *Nat'l Hockey League v. Metro Hockey Club, Inc.,* 427 U.S. 639, 643 (1976)). But that is an inaccurate reading of this Court's cases.

In *Hammond,* this Court upheld the trial court's striking of pleadings for failure to comply with discovery orders as consistent with due process, but took great care to emphasize that the Court had not penalized the defendant "for a failure to do that which it may not have been in its power to do." *Hammond,* 212 U.S. at 347. Elaborating further, the *Hammond* Court noted that "[a]ll the statute required was a bona fide effort to comply with an order . . . and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order." *Id.* at 347.

Similarly, in *National Hockey League*, this Court affirmed the dismissal of a complaint as a sanction for plaintiff's failure to comply with discovery orders. Resp. Opp. at 23. However, the Court qualified its holding, observing that a district court should *not* dismiss a complaint "because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith or any fault of petitioner." *Nat'l Hockey League,* 427 U.S. at 640 (quoting *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958)).

Finally, this Court similarly noted in *National Union* – a case discussed in the petition – that the appeal there "was not summarily dismissed." *Nat'l Union,* 348 U.S. at 44. Instead, the *National Union* petitioner "was allowed 15 days, after

being adjudged in contempt, within which to purge itself." *Id.*

In sum, HH&C's own authority confirms Capital Suisse's position that due process obligated the Utah Supreme Court to determine whether Capital Suisse was unable – despite good faith efforts – to comply with the court's discovery and bond requirements before dismissing its appeal. HH&C's misreading of this Court's decisions merely confirms the need for the Court to grant this petition and resolve the conflict over what it means to provide a litigant with a "fair opportunity" for a "meaningful appeal."[2]

D. The Question Presented Is Of Significant National Importance.

HH&C has likewise failed to undermine petitioners' showing that the issue presented here is one of significant national import. For example, HH&C assumes that the Second Circuit's *Pennzoil* decision is of limited significance because of its "extraordinary" facts. Yet despite these "extraordinary" facts, four Justices found the due process issue worthy of analysis in concurring opinions, and reached conflicting conclusions. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 22, 23, 28-29, 32 (1987); Pet. 14-15. The *Pennzoil* concurrences demonstrate the importance as well as the disagreements surrounding the question presented here.

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[2] HH&C oddly accuses Capital Suisse of "focus[ing] almost exclusively on the condition requiring the posting of a bond" in the courts below, Resp. Opp. 17, and "remain[ing] silent about" Capital Suisse's purported failure to comply fully with the district court's discovery orders. That is untrue. Capital Suisse repeatedly emphasized its inability to comply fully with the discovery requirements imposed by the Utah Supreme Court. *See, e.g.*, Pet. at 10 n. 2 (production of all documents impossible because some were destroyed by disgruntled employees); *id.* at 11 (same); *id.* at 17-18 n.3 (noting "good faith efforts . . . to comply with a pretrial production order"); *id.* at 19-20 (noting that Capital Suisse was "*incapable* of complying with its discovery and bond obligations").

HH&C further dismisses as "conclusory" Capital Suisse's observation that numerous state constitutions contain an unconditional right to appeal. In fact, however, Capital Suisse cited several such state constitutional provisions in their petition, and there are many others.[3] Thus, the issue presented here will plainly affect litigants in States across the country.

II. THE EQUAL PROTECTION ISSUE RAISED IN THE PETITION WAS ALSO RAISED BELOW AND IS EQUALLY WORTHY OF THIS COURT'S REVIEW.

The equal protection issue raised in the petition likewise merits this Court's review. Significantly, HH&C does not dispute that the decisions below conflict with the three state supreme court decisions cited in the petition. *See* Pet. at 20-22 (citing *Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004)). Nor does HH&C dispute that the decisions below conflict with this Court's own equal protection precedent. *See* Pet. at 22-23 (citing *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

In fact, HH&C does not address Capital Suisse's equal protection argument at all, except to say that Capital Suisse did not raise it below. Resp. Opp. At 16. But HH&C is wrong. While perhaps not invoking the magic words that HH&C demands, Capital Suisse did raise the equal protection

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[3] In addition to Utah, large states such as Illinois, Pennsylvania, Texas and Florida grant their citizens a constitutional right to appeal civil judgments, as do a number of other states, including Nebraska, Kentucky, Louisiana and New Mexico. *See* Ill. Const. art. VI, § 6; Pa. Const. art. V, § 9; *Pennzoil*, 784 F.2d at 1154 ("The Texas constitution grants a right of appeal to all civil and criminal litigants."); Neb. Const. art. I, § 23; Fl. Const. art. V, § 4; Ky. Const. § 115; La. Const. art. 5, § 10; N.M. Const. art. 6, § 2.

argument below, and the Utah Supreme Court, while not perfectly clear, appears to have addressed the argument.

In Capital Suisse's Certification of Good Faith Attempt to Comply with Court Order to the Utah Supreme Court, Capital Suisse explained that a party may be excused from a supersedeas bond requirement when it is "financially impossible for it to post the bond," and then cited as support for that proposition the equal-protection decision of an intermediate Utah appellate court in *D'Aston v. D'Aston*, 790 P.2d 590 (Utah Ct. App. 1990). Resp. App. 14b. The *D'Aston* Court, citing this Court's decision in *National Union*, addressed the constitutionality under the equal protection clause of dismissing an appeal where a party had failed to comply with a bond requirement. *D'Aston*, 790 P.2d at 594.

Thus, while Capital Suisse could perhaps have been more explicit, the propriety of imposing bond requirements upon those who lacked the requisite resources and were unable to comply was in fact before the Utah Supreme Court. *See* App. 131a-135a; Resp. App. 12b-19b. And denying access to courts based upon a party's financial status raises an obvious equal protection issue (beyond the obvious due process issue) that would be apparent to any experienced judge. *See, e.g.*, *Griffin*, 351 U.S. 12 (declaring unconstitutional state rule requiring criminal defendants to pay for transcripts prior to appellate review because it "cut off appeal rights for indigents while leaving avenues of appeal open for other defendants"); *Mayer v. Chicago*, 404 U.S. 189 (1971) (noting "flat prohibition" against "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay).

In its opposition, HH&C nevertheless cites *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988), for the proposition that a "generic reference" to Fourteenth Amendment claims is "insufficient to preserve a constitutional claim." Resp. Opp. at 14 (internal quotes omitted). HH&C fails to note, however,

that this Court held that the petitioner there *had* preserved his Sixth Amendment claim in much the same way that petitioners preserved their equal protection claim here: Although the petitioner had not expressly stated his reliance on the Sixth Amendment, he "cited and relied upon, through a quotation from an Illinois Appellate court decision, two of our Compulsory Process Clause cases[.]" *Id.* Accordingly, this Court went on to say, "the authority cited by petitioner, and the manner in which the fundamental right at issue has been described and understood by the Illinois courts, make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Id.* So too here.[4]

Moreover, as noted earlier, this Court does not even need to assess and evaluate the sufficiency of the arguments made below when the state court itself appears to have addressed the constitutional issue. Here, the Utah Supreme Court, quoting *National Union*, specifically acknowledged that "a statutory review is important and must be exercised *without discrimination* . . . ." App. 12a (emphasis added). And in discussing its authority to limit a plaintiff's substantive right to appeal under article VIII, section 5 of the Utah Constitution, the Utah Supreme Court relied heavily on *D'Aston*, which as noted above explicitly addressed federal equal protection requirements. *See* App. 6a-9a; *see also D'Aston*, 790 P.2d at 594.

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[4] *See also Illinois v. Gates*, 462 U.S. 213, 247 (1983) ("no particular form of words or phrases is essential" to preserve argument); *Crowell v. Randell*, 35 U.S. 368, 392 (1836) ("[I]t is not indispensable that [the issue] should appear on the record, in totidem verbis, or by direct and positive statement"); *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598 (1954) (Court accepted issue for review, "[t]hough inexplicit" below).